& Co. is required before four o'clock." That agrees with the cases I have mentioned, and *Bailey* vs. *Porter* has been referred to on many occasions as an authority, and we think it governs this case.

Judgment affirmed.

In the Court of Exchequer, June, 1859.

GOODWYN *vs.* CHAVELEY.

Plaintiff's men were driving thirty-six oxen along the road between five and six o'clock of an evening in November; twenty-three escaped into a field of defendant's adjoining the road, through gaps in his fence. The men drove on the remaining thirteen to the nearest obtainable place of safety for the night, and returned (having been absent about an hour) for the other twenty-three left in defendant's field. Defendant had then impounded them, for which the plaintiff brought this action. The learned judge at the trial directed the jury that, under the circumstances of the case, the plaintiff's men had not removed, or tried to remove, the cattle within a reasonable time, and directed a verdict for the defendant:

Held, (Bramwell, B dissentiente,) to be a misdirection; that it was not a question of law for the opinion of the judge, but a question of fact upon the evidence given, that should be determined by the jury, and consequently there must be a new trial.

This was an action against the defendant for impounding the plaintiff's cattle. Defendant pleaded that he took them damage feasant in his close. Plaintiff replied that his cattle were lawfully going along a road, when other cattle were being driven along the road; that plaintiff's cattle escaped into defendant's close, and that plaintiff within reasonable time removed them, but that defendant had impounded them before reasonable time had elapsed for plaintiff to remove them. Defendant joined issue thereon.

The plaintiff's man, assisted by another person, was driving thirty-six oxen along the highway about half-past five o'clock at night in the month of November; some twenty-three escaped into the defendant's field through the gaps in his fences adjoining the road; thirteen remained outside in the road. The man drove on the thirteen to the nearest place he could find for them, and there lodged them for the night. He then immediately returned for the

others in defendant's field, but found the defendant had impounded them. The men were absent from the twenty-three in defendant's field about an hour. The cause was tried before Bramwell, B., in Essex, who directed the jury that the plaintiff's men had not, under the circumstances, removed the cattle, or tried to remove them, within a reasonable time, and therefore defendant had not impounded them before a reasonable time had elapsed for their being removed, and directed a verdict for defendant. A rule *nisi* having been obtained for a new trial, on the ground of misdirection,

Hawkins, Q. C. and *Turner* showed cause.

Honyman, contra, in support of the rule.

The following authorities were cited:—*Ramchum Mullich* vs. *Luchmeechund Radakizen*, 9 Moore P. C. C., 46; Taylor on Evid. sect. 31; *Tennant* vs. *Bell*, 9 Q. B., 684; *Hunter* vs. *Caldwell*, 10 Q. B., 69; *Attwood* vs. *Emery*, 1 C. B., N. S., 110; *Phillips* vs. *Irving*, 1 M. & G., 325; *Burton* vs. *Griffiths*, 11 M. & W. 817; *Temple* vs. *Pullen*, 8 Ex., 389. *Cur. adv. vult.*

June 14.—BRAMWELL, B.—This case was tried before me, and unhappily we are not all agreed. I have the misfortune to be alone in the opinion I entertain—an opinion which I expressed at the trial, and, unfortunately, abide by, and which I must now express. But, in order to make the judgment I have to deliver more intelligible, I will shortly state what the question was. The plaintiff complained of a trespass, that his cattle had been taken and impounded; the defendant pleaded that he took them damage feasant in his close. The plaintiff replied that the cattle were lawfully going or being driven along a road, and at the same time some other cattle were being driven along the road; that they escaped into the defendant's close, and that he the plaintiff, within a reasonable time, removed them, but the defendant impounded them before a reasonable time had elapsed for him the plaintiff to remove them. Upon that the defendant took issue, and the question at the trial was, whether the defendant impounded these cattle and removed them from his close before a reasonable time for the plaintiff to remove them had elapsed. Upon the trial it appeared that the plaintiff's men were driving upwards of twenty-two oxen along the road—

twenty-three or twenty-two, it is not material. The plaintiff's man was assisted by another drover; it was night, and there were gaps in the fences of defendant's field, who was not shown to be under any obligation to fence; through these gaps the cattle in question escaped into the defendant's field. All the cattle did not escape; seven or eight escaped into the defendant's close, the rest, the larger portion, remained in the road. The plaintiff's men, thinking it better to leave the cattle where they were in the defendant's field in safety, drove the others on, instead of leaving them in the road unprotected, to a place of safety, the nearest they could find, and there lodged and housed them for the night, and with all convenient speed came back to the defendant's close. When they arrived there, the cattle which had strayed into the defendant's close had been taken and impounded. It ought to be added that the plaintiff's witness very truly considered this; he said, "There was nothing to prevent me driving the cattle off the close before their getting into it, except that I preferred taking care of those which had not escaped into the close. I could have got them out sooner than I did." It was not necessary to say what time elapsed. I think it was about an hour between the time when the cattle got first into the close, and when the plaintiff's men were enabled to come back and take them away. It is not necessary to mention that, or to be particular as to the time, because it was admitted by the plaintiff's men, that they could have turned and got the cattle off the defendant's close before they were taken and impounded, had they thought fit, but they did not think fit, because they preferred to take care of the cattle which had not so escaped into the close. Now, upon that I ruled that the plaintiff's men had confessed, and their statement was not controverted by the plaintiff—it was assumed they were telling the truth—I ruled, that being taken to be so, it appeared upon the plaintiff's case, and it was admitted by him, that the plaintiff's men had not removed the cattle, or tried to remove them within a reasonable time, and consequently that the defendant had not impounded them before a reasonable time for their being removed had elapsed. Now upon that ruling of mine, accordingly I directed a verdict for the defendant, and my ruling

was questioned by a motion in this court for a new trial for misdirection. I propose to show why I think that ruling was correct. Now some confusion arose, as always does it seems arise in questions of this description, as to how far it is one of law or one of fact, how far it is open to a judge to determine it. I do not believe there is much difference upon the matter. I am of opinion that all these cases raise two questions: first, what is the rule of law to determine what is or is not reasonable; next, what are the facts to show whether they are brought with the rule. I do not know that one can instance it better than by the case so often mentioned in the course of the argument. A man gives an order for a coat to a tailor; the coat is brought home at the end of six months; the person who has ordered it refuses to take it, upon which an action is brought; the question is, whether the coat is tendered within a reasonable time. We will suppose the plaintiff to admit that the ordinary time within which a coat is made and delivered is a week or ten days, or something of that sort, at all events six months is a great deal longer than the ordinary time. In a case of that kind I am clearly of opinion that the judge may direct a verdict for the defendant. He may say, "The law is, a man is bound in a case of this description to deliver the article or tender it within a reasonable time, and that, reasonable time, in the absence of anything to control a particular engagement, is the ordinary time. I tell you, that being the law, the facts being admitted by the plaintiff that he did not do it within that time, you must find your verdict for the defendant." So here it seems to me, if I was right in holding, as I did hold, and as I think still, that a reasonable time to do it is a reasonable time for the act itself, without reference to extrinsic circumstances—inasmuch as if a man admitted he could have done it within such a time as that, but had taken a longer time because extrinsic circumstances made it desirable he should do so—it appears to me, if I was right in holding that proposition of law, that I was right in directing a verdict for the defendant. Of course I can perfectly well understand that there are cases in which a question of this description must be left to the jury. Suppose for instance, I put again the case of the coat; sup-

pose one set of witnesses say the usual time within which to deliver it is a week, and others say the usual time is a month, all the judge can say is, "Gentlemen, I rule it must be done within a reasonable time; it is for you to determine what that is." But it seems to me, where the facts are admitted, and being admitted that the time exceeds that which by law is a reasonable time, it seems that the judge is not only warranted, but is bound, to direct that a reasonable time has been exceeded, and direct a verdict for the party who makes that contention; just in the same way as he would be bound equally to direct a verdict for the plaintiff or the defendant in the case where the coat had been tendered in the ordinary time. So much for the first part of the discussion, as to which there was, and always will be, some confusion, I suppose, owing to the matter not being discriminated in the way in which it ought to have been. But now the remaining question is, whether I was right in holding that a reasonable time within which to do this was a reasonable time to do the act itself, without reference to extrinsic circumstances. I think it was. I think I was right, and I proceed to say why. The plaintiff had no right to have his cattle trespass on the defendant's land. The law is this; he has a right to take his cattle along the highway; and certainly if they do go along the highway and there are no fences in the adjoining land, it is certain that they will stray; therefore the plaintiff cannot prevent it, and as that is a necessary consequence of the enjoyment of the right of using the highway, why it is a necessary evil, I suppose, which those whose lands border on the highway must sustain; but that being the reason of the rule, it extends as far as reason points out, and no further; and, consequently, what you may call the right of the plaintiff, or his immunity from the consequence, extends no further than there is necessity for it. I own, I think that is pretty tolerably plain reasoning, and inasmuch as there was no necessity for these cattle stopping longer in the place than was necessary actually to turn them off, it seems to me manifest that they stopped there an unreasonable time, and, consequently, the defendant did not distrain them before a reasonable time for their removal had elapsed. It seems to me that the fallacy—which I have my Lord

Wensleydale's authority for saying is not a discourteous term to apply to those who differ from you—the fallacy of the argument on the other side is in considering this a case of reasonableness with reference to the situation of the plaintiff, if we may say so. I readily admit, if it had been the plaintiff's fault that the cattle had strayed, and that he had complained of his men for leaving them there, instead of at once turning them off, and saying, "Your behavior was not reasonable behavior," as his servants, they would have a very excellent answer, because they would have been at liberty to say, "It was the best thing we could do." The question is, not what was the best thing they could do for him, but what was the best thing they could do for the defendant, whose cattle had trespassed. In like way it may be, for any thing I know, that the public would rejoice and compliment these two drovers for leaving the cattle safely browsing upon the defendant's pastures, and taking the others to a place of safety, rather than leave them unprotected in the road, to wander about, and possibly do mischief. But it is the defendant's case to be considered, and not that of the public. I admit, if the question were, whether the drovers should be punished for what they have done, I say they ought not to be punished. But I say again, what are the defendant's rights in the matter? His right is to have his land trespassed on as little as posssible, to no greater extent than is absolutely necessary. I therefore think a reasonable time was such, and no more than was required for the act itself. The case was argued as though there had been some desperate hardship upon the plaintiff in this way of dealing with it; but there is none. His cattle are distrained and impounded. What then? He must get them out. What is the situation of the defendant? How long are they to browse upon his land? He cannot maintain any action. If he can maintain any action for the trespass in coming on to his land, it is admitted he would not be right in not proceeding to it. According to the argument that on the part of the plaintiff, rather than he should have the inconvenience of getting the cattle out of the pound, the defendant is to undergo the inconvenience of having his crops, whatever they may be—corn or any thing else—grazed upon until

the plaintiff could get a convenient and comfortable time to remove them; and for aught I can see, the same argument might go on to this extent, that they might continue in the plaintiff's field for twenty-four hours, because the men could not sooner have housed the remaining cattle. Suppose they were driving them and some of the cattle had been seized with a vagary and had gone into some other field; and suppose the question had been whether they might not have collected them and got them into a place of safety; if the question is which of these two parties ought to bear the loss, why should it not be the plaintiff? The plaintiff's cattle had no right in the defendant's field. If the question is whether the defendant's herbage and crops are to be grazed and browsed upon without any compensation till it is convenient for the drovers to come back and take them away; or on the other hand, the plaintiff is to be at the inconvenience of getting his cattle out of the pound, it seems to me this very consideration points to the plaintiff bearing the loss rather than the defendant. One of them must do it. I think, therefore, that the plaintiff's duty was to see that, so far as he may have had a right or an immunity from the consequences of the trespass in consequence of the cattle going into the defendant's land, it was a right and an immunity to the extent to which it was necessary, and no more. Then it was not necessary, because there was no physical impossibility that they should not be at once driven off, and if either party is to bear the loss, it seems to me it should be on the part of the plaintiff. One may put by the way another argument, which had escaped me, for the purpose of showing the hardship upon the defendant, the very circumstances of this case; he comes to his field, and he finds cattle quietly grazing there; there is no duty in anybody to leave them there, because, it was contended, the duty was to drive the rest of the herd on; there is no notice by the plaintiff when they would be taken away, or anything to indicate that he may or may not impound them. How long is he to remain? What is he to do? Is he to make inquiries of any one, and say, "Have you seen two careful drovers driving the rest of the herd along the road with the appearance of an *animus revertendi* to come and take them away? because, if so, I cannot

impound them." What is he to do? He can do nothing but impound them. For these reasons I think I was right to rule as I did. I thought it a clear case then, and I own, as a matter of reasoning, I think it a clear case now. I am sorry for it, because I probably am in the wrong, and, if so, I am very much in the wrong. I cannot change my opinion, and I am bound to express it in the way in which I have done.

MARTIN, B.—My opinion is, this point is essentially a question for the jury, and not a question of law, in my judgment, at all. It is said that the defendant in this case was not to blame. I do not say he is to blame. I am not aware that he could be indicted for not fencing his field from the road, which most people in this country do; they put fences between their fields and the road. If a man will not do that, it seems to me he must put up with some of the inconveniences consequent upon it. Now one of the inconveniences is, that cattle being driven upon the road will stray. But the facts of this case were these—that a man was driving twenty-three bullocks at nightfall in the month of November, and as he was driving them along, two or three of these bullocks went into a field, there being no fence to protect the road from the defendant's field; and that thereupon the man who was driving them, drove the remainder of the cattle—nineteen or twenty head of cattle—to some place, where they were secured, and immediately came back to bring the cattle out of the plaintiff's field. It seems to me that that man did all he reasonably could be required to do. He was under no obligation to leave the rest of his master's cattle to stray at nightfall upon the road, for the purpose of relieving the defendant from injury from the plaintiff's cattle, which had got into his field. In my judgment the main cause of this was, the man not doing what was ordinarily done, to have a fence to keep them off. It seems a right question for the jury, and not a question upon which a judge could take upon himself to direct absolutely a verdict one way or the other. The jury have found the man did not remove them as soon as he reasonably might have done. As I understand, they adopted that view, and I am inclined to adopt that view. That man had done all he possibly could do; there was no

obligation upon him to permit the other man's cattle to stray, and possibly be lost, for the purpose of relieving this man from the consequence of not having a fence between the field and the road. All I say is, it was a question for the jury, and I should not have been satisfied if they had found a verdict for the plaintiff at all, if the plaintiff was the man who brought the action for the trespass, and if they had found against the owner of the field.

POLLOCK, C. B.—I have also the misfortune to differ from my brother Bramwell. I think the rule for a new trial, which was founded on a misdirection of my brother Bramwell, ought to be made absolute. My brother Bramwell's direction is in substance this; that if more time was taken to remove the cattle than was reasonably necessary for that purpose, and that purpose only, and then the cattle were not removed within a reasonable time, that the defendant had a right to distrain them without reference to any other extrinsic circumstances whatever. I think that is not the law. I think it cannot be the law in any country where reason and good sense prevail. It certainly is not the law according to any authority that was cited. And then the question is, if a man who has land adjoining a highway will not do as persons who have any valuable crop growing upon it usually do, by fencing guard the land from the encroachment of cattle going along the highway; the question is whether he is entitled to require that the drovers (and I must assume that there were on this occasion the proper and reasonable number required for the cattle on the road,)—whether the owner of the land adjoining the road has a right to say, "You shall remove the cattle from my land, on which they have strayed," without reference to any other consideration upon the whole earth; if one of the cattle remaining on the road has trodden upon one of the persons who are there; or if some circumstance occurred that required the sheriff instantly to say, "I call on you, in the King's name, to assist to arrest a felon in the field," or "I call on you to prevent a breach of the peace;" or if circumstances occurred by which if a man does not give his attention for a few minutes to a person in great peril of life—all these circumstances, it is suggested, are to have no weight whatever—the owner of the cattle has, appa-

rently, a right to the instant attention of the drovers, to neglect everything else, every other duty, even a public duty which they may be called on to perform, and clear his field of the cattle, from which he might entirely have excluded them if he had taken the ordinary means people do of fencing their land from the public highway. I think the owner of land adjoining a highway, upon whose property cattle have strayed, has a right to have the cattle removed within a reasonable time, with reference to all the circumstances that may belong to the transaction at the time of its occurrence, that he has no other or greater right than that, and inasmuch as cattle upon the highway require to be directed and care to be taken with reference both to the public and with reference to the cattle themselves, and especially during the night—it appears to me that if, for instance, the cattle can be taken to a place of safety within a few minutes, and then the drovers may return and with perfect safety to all the cattle, drive off those which have strayed, I think that is a circumstance that may fairly be presented to the jury. If the cattle cannot be put in a place of safety for many hours, it may be a matter to be submitted to the jury to say that they ought then to have run the risk, and to have removed the cattle more immediately. It appears to me that the jury, with all the circumstances before them, have had the question put to them whether the cattle have been removed within a reasonable time with reference to the circumstances of the particular case. I think, therefore, the direction was wrong, and that the rule for a new trial ought to be made absolute. My brother Channell is of the same opinion.—*Rule absolute for a new trial.*

In the Court of Queen's Bench, February 1859.

THE LONDON AND NORTH-WESTERN RAILWAY *vs.* GLYN.

The plaintiffs, common carriers, effected an insurance against fire with defendant; one of the conditions of the policy was, that "goods held in trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property." £15,000 was declared to be insured on "goods, their (the plaintiffs) own, and in trust as carriers," on certain premises therein